



Merger referrals in practice

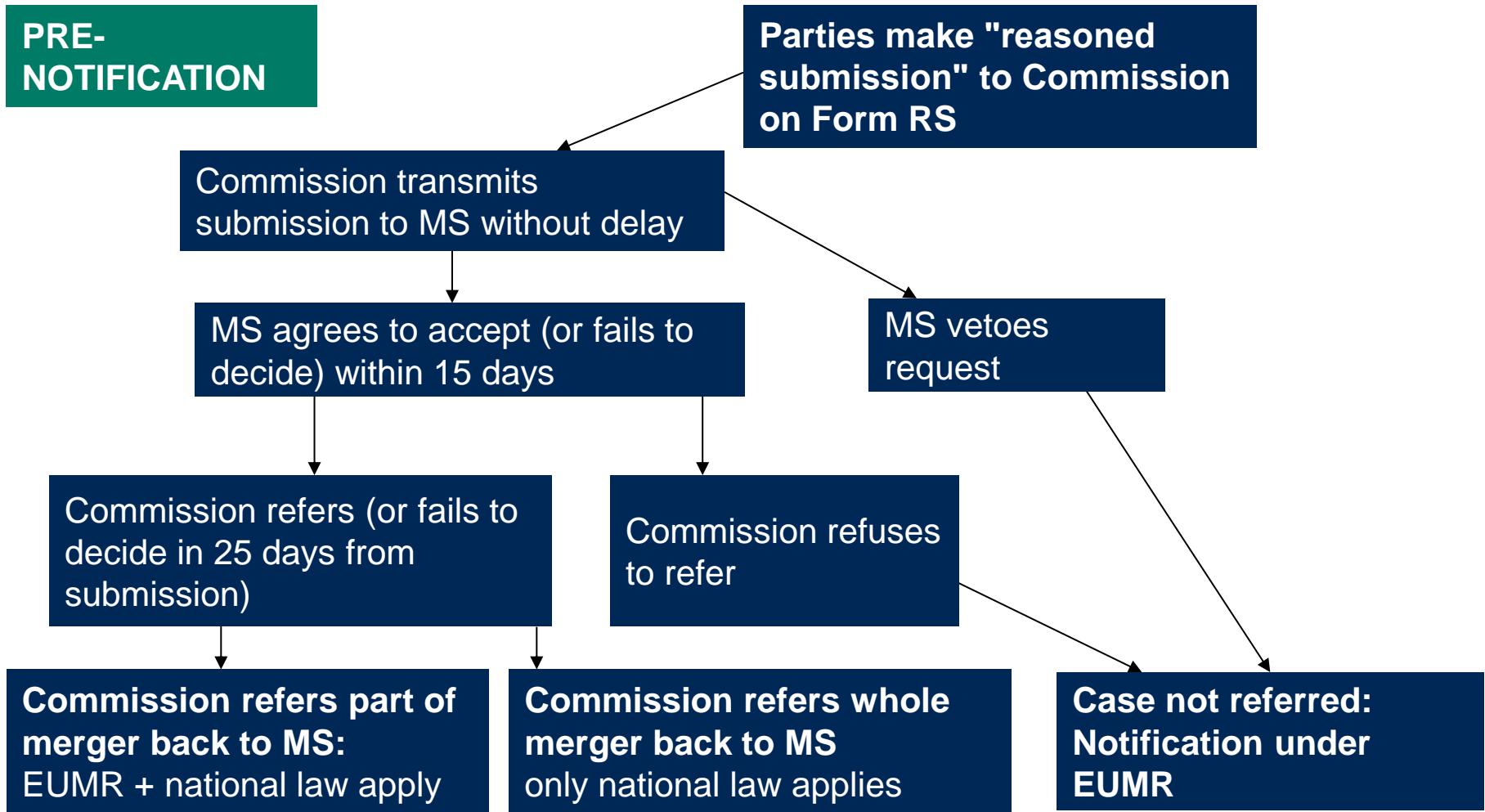
Fiona Carlin

9 October 2017, 94th GCLC Lunch Talk

1

Procedure and practice

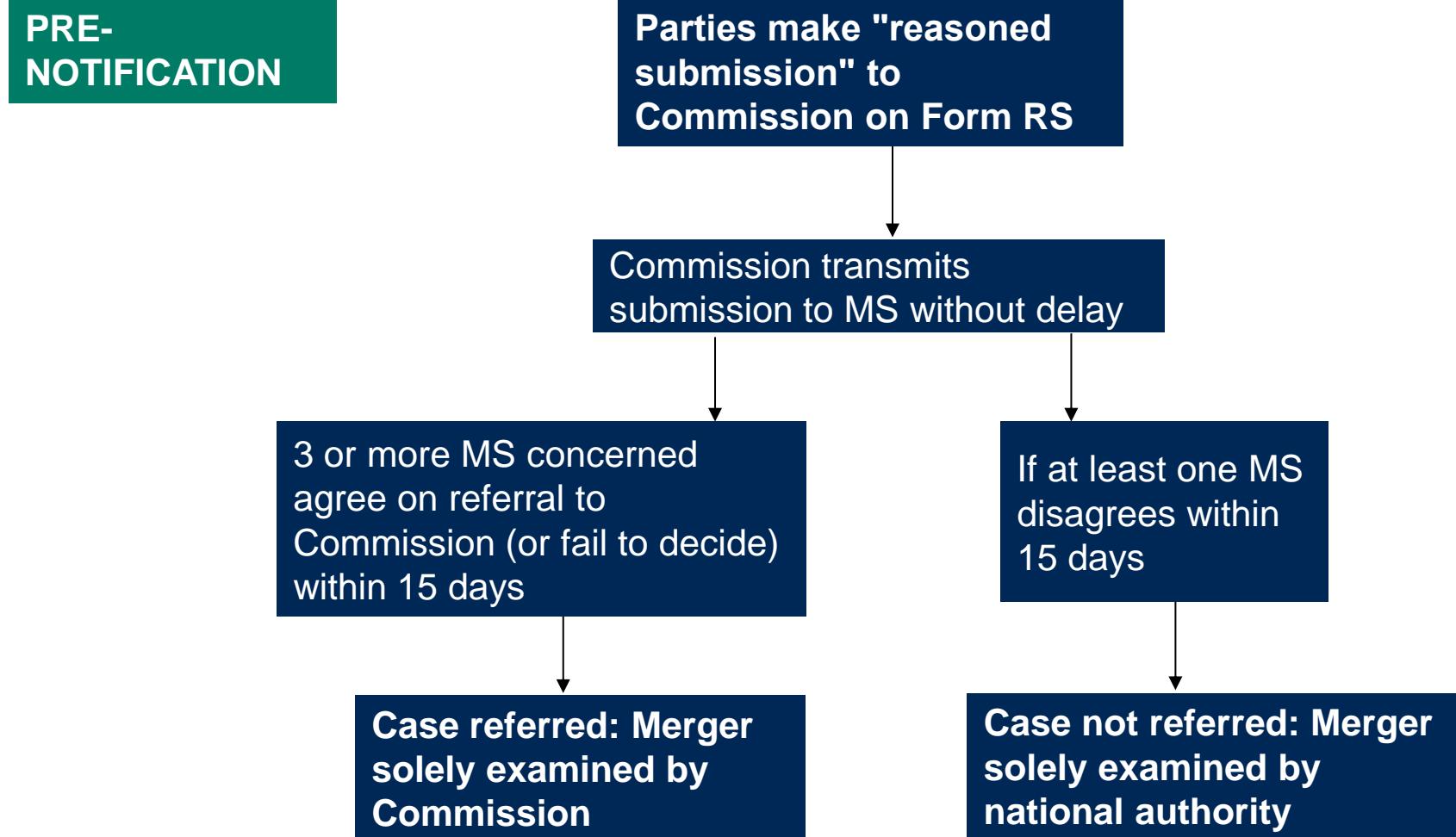
Article 4(4): referral to Member State at request of parties



Article 4(4) in practice

- Commission discretion on significant effect in distinct national market – MS to express a preliminary assessment within 45 days of referral
- No cases refused
- 135 referrals in full, 10 in part – uncontroversial local markets: cinemas, regional railway franchises, construction, pharmacy and hospital mergers, fitness facilities...
- Partial referral to Germany in *Xella/H+H* – acquisition of Danish building materials company by public bid. H+H active in aerated concrete blocks for public buildings transportable for 150km around the plant. Principal effects in certain German regional markets – Commission agreed to partial referral to BKA.
- Sept. 2017: *LaPoste/Suez* – Commission accepts that FCA is best placed to assess JV for the recovery and recycling of office waste at national level and in different local zones, with particular emphasis on the leverage effects the parties could use from their other unrelated activities to the benefit of the JV, noting that the FCA had recently examined two other transactions in the recycling sector.

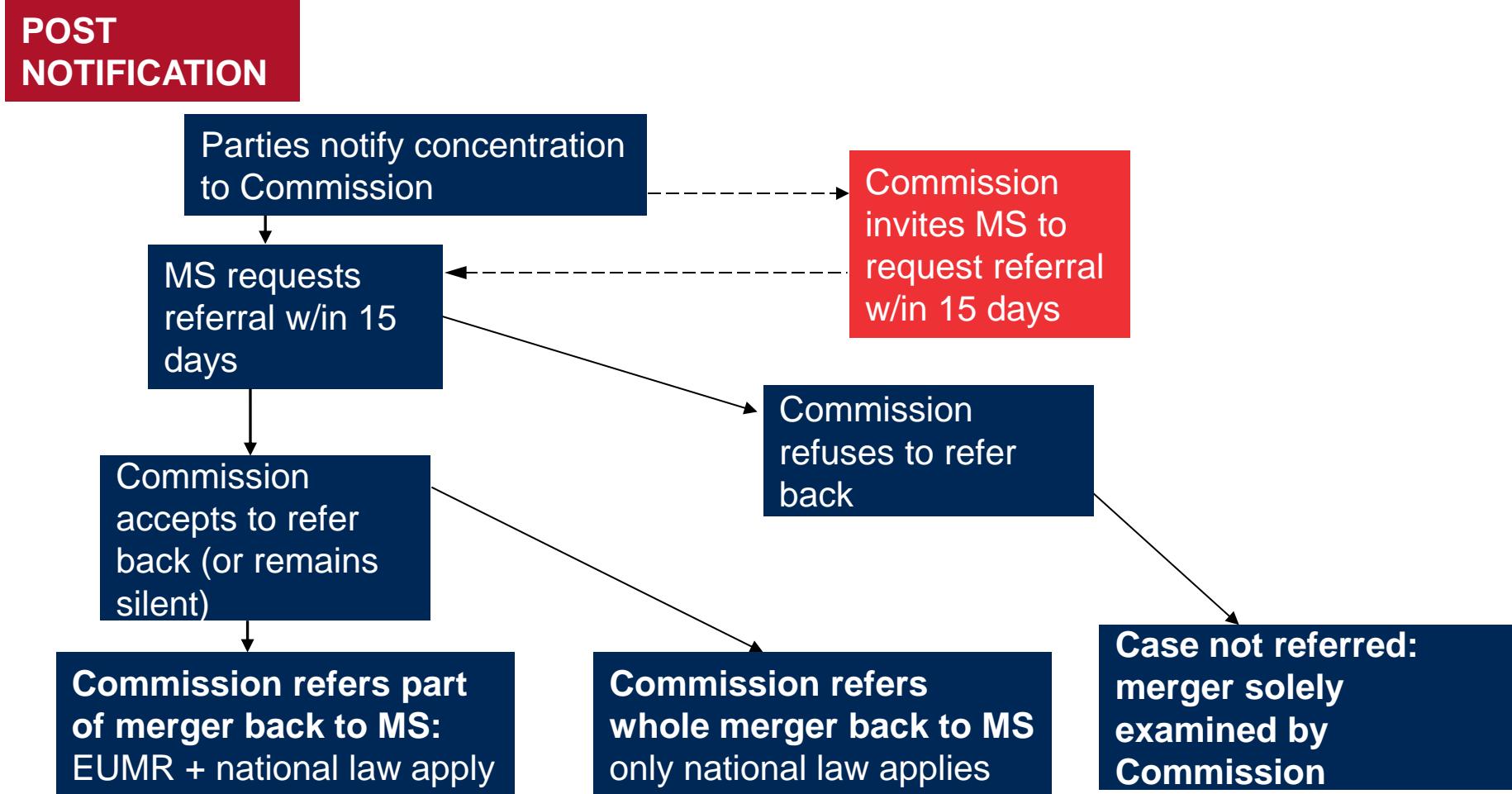
Article 4(5): referral to Commission at request of parties



Article 4(5) in practice

- 3+ rule - Commission has no discretion if Member States don't object, Commission has full jurisdiction – no national regimes run in parallel
- 7 out of 334 requests refused – details are not made public

Article 9: downward referral at request of Member State



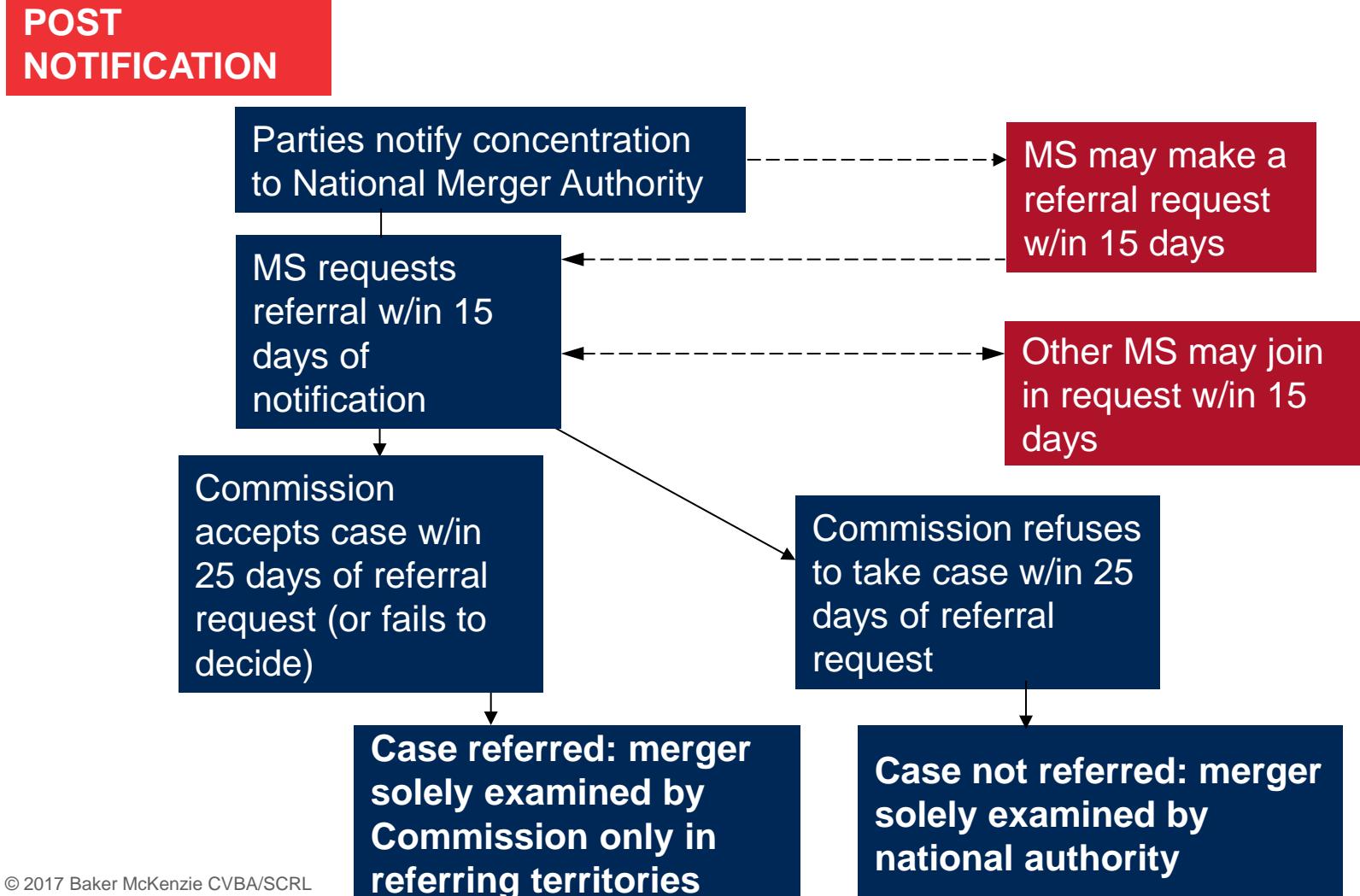
Article 9 referrals in practice

- 9(2)(a): threatens to significantly affect competition in a distinct national market – Commission discretion
- 9(2)(b): affects competition on a distinct market not being a substantial part of the EU – Commission has no discretion
- Parties often willing to offer Commission phase 1 remedies to avoid referrals – such as:
 - *Veolia/Cleanaway* – would have led to 100% share in the disposal of industrial and commercial waste through high temperature incinerators – parties offered to divest one of two facilities to remove the horizontal overlap leading the OFT to withdraw its referral request; ditto *T-Mobile/Orange*
- Types of cases readily referred: armoured cars (Germany), pharma wholesale in parts of Italy, petroleum storage facilities in Languedoc-Rousillon, airport infrastructure in Exeter...
- Partial referrals: *Carrefour/Promodes* – upstream overlaps and non-problematic downstream markets cleared in Brussels; local market downstream overlaps referred to French and Spanish NCAs.

Rejection of post-notification Member State referral requests (Article 9)

Case	Request	Comment
NN Group / Delta Lloyd (2017)	Netherlands	Test for referral not met – no competition concerns.
Vodafone / Liberty Global (2016)	Netherlands	COMP cited its telecoms experience and the need for consistency in the sector across the EEA.
Hutchinson 3G / Telefonica UK (2015)	UK	COMP cited its particular interest in the sector.
Altice / PT Portugal (2015)	Portugal	COMP cited its telecoms experience and the need for consistency in the sector across the EEA. Each of the relevant markets affected constituted a substantial part of the internal market.
Orange / Jazztel (2014)	Spain	COMP cited its telecoms experience and the need for consistency in the sector across the EEA.
Liberty Global / Ziggo (2014)	Netherlands	COMP insists it's "best placed" – public comments by Almunia.
Holcim / Cemex West (2014)	Germany	Effect in Belgium, Netherlands, NE France. Scope of market wider than national. Test for referral not met. Germany argued specific sectoral knowledge.
Telefonica Deutschland / E-plus (2014)	Germany	COMP cited its telecoms experience and the need for consistency in the sector across the EEA.
Credit Agricole / Cassa Di Risparmio / Agences Intesa (2010)	Italy	Insufficient reasoning by the Italian NCA.
EDF / Segebel (2009)	Belgium	Cross-border analysis required – insufficient Belgian resources. COMP cited its expertise in the Belgian electricity markets.
AIG Capital Partners / Bulgarian Telecommunications Company (2007)	Bulgaria	Test for referral not met, and insufficient information provided by Bulgarian NCA.
Lagardere / Natexis / VUP (2003)	France	Test for referral not met. French publishing also affected Belgium.
EDF / London Electricity (1999)	UK	Test for referral not met – absence of significant market effect.
Alcatel / AEG Kabel (1991)	Germany	Test for referral not met – no distinct German market or threat of SIEC.

Article 22: upward referral to Commission at Member State request



Article 22 referrals in practice

- No Community dimension but significant effect on competition in the referring State (even if local merger laws not triggered) and affect on trade
- T-221/95 (1999), GC in *Endemol* re JV with Holland Media Group referred by Dutch government for Commission to look at TV advertising market. Endemol argued that Commission couldn't examine TV production market since the referral request didn't flag that. GC affirms that Commission powers circumscribed only by Article 22 – the referring Member State cannot control the scope/conduct of the Commission's investigation.
- 32 requests – 4 refused

Rejection of Member State requests to refer to Commission (Article 22)

Case	Request	Comment
London Stock Exchange Group PLC / LCH Clearnet Group Limited (2012)	Portugal (joined by France and Spain but not UK)	Wide discretion – UK had vetoed 4(5), notifications in France and Spain underway – costs outweigh advantage of one-stop-shop
Proctor & Gamble / Sara Lee Air Care (2010)	Hungary (accepted for Belgium, Germany, Portugal, Spain and UK)	Notified in Spain and Portugal. Spain referred – joined by Belgium, Greece, France, Czech, Italy more of which had local jurisdiction. Commission jurisdiction over referring States only
Coca Cola Hellenic Bottling Company / Lantis Bros (2006)	Cyprus	Deal had no effect outside Cyprus
Gas Natural / Endesa (2005)	Italy, Portugal	Spain (main market) didn't join. Italy and Portugal didn't demonstrate significant effect on their markets

2

From a company's perspective

What does this mean for business?

- Well-functioning and largely predictable referral system allows advisors to proactively manage jurisdiction and client expectations upfront - despite additional burden of the Form RS
 - Art. 4(4) referral request to MS unlikely to be contested
 - Art. 4(5) referral: delicate balancing of differences of cost savings/efficiencies of national filings versus referral system – the threshold is around four to five filings depending on the NCAs involved (some NCAs e.g. Germany, can be very quick versus other countries)
 - Art 9. risk can be contained with proactive engagement with both the EC and the NCAs so as to avoid a referral and confidence of an Art. 9 referral rejection can be taken in certain sectors (e.g. telecoms) where a pan-EU industrial strategy is easily identified versus national interests;
 - But be aware that the system can be “used” politically (e.g. Art. 22 upwards referral in *Aegean/Olympic II* demanded by Commissioner Almunia to ensure consistency with *Aegean/Olympic I* when the latter case did not have Union dimension).

When to seek an upfront referral?

- Starting point will be to assess where jurisdiction lies (EC or NCA?).
- If original jurisdiction with the EC:
 - Consider carefully if an Art.9 risk exists (is there a national interest in the case given the locus of the competitive effects or the industry)?
 - If so, can this Art. 9 risk be proactively managed to maintain EC jurisdiction?
 - Can the NCA be informally engaged in tandem, to assure them that the EC process will be comprehensive, and that the NCA will be fully consulted throughout so as to render a referral unnecessary?
 - Is there an Art. 9(2)(b) referral risk as a result of the non-substantial part of the common market test being met (i.e. no EC discretion)?
 - If risk cannot be managed – consider an upfront Art. 4(4) referral request to the NCA.

When to seek an upfront referral?

- If original jurisdiction with three or more NCAs:
 - Consider carefully the NCAs with jurisdiction:
 - How many filings? More than five or six?
 - What is the relative cost burden of the multiple NCA filings versus a Form RS plus Form CO (note that the Form CO will largely build on the Form RS so cost savings can be made versus normal Form CO)?
 - What are the NCA's track records for handling cases in practice versus the statutory timetable?
 - Does the NCA or the EC have more recent experience of the sector?
 - Is there a veto risk given the locus of the competitive effects or the industry? Is there an intervention risk at either level?
 - Does the additional time in preparing the Form RS and the 15 WD delay affect the client's overall position (e.g. closing timetable)?
 - If on balance the indications favour EC jurisdiction, consider an upfront Art. 4(5) referral request to the EC – but not simply because three or more NCA filings are triggered.

Contractual matters?

- Upfront strategy should include focus on contractual documents between the parties to ensure that:
 - Deal Structure is configured to optimise jurisdiction if possible (e.g. enlarge deal size to trigger EUMR and vice versa);
 - Conditions Precedent work to envisage both partial and full referral of cases so that in any event the deal can go unconditional if all clearances are obtained (no need for parties to latterly waive conditions or amend terms);
 - Best Efforts clauses (and regulatory side letters) anticipate intervention outcomes by all potential regulators and ensure timely cooperation of both sides throughout process;
 - Long-Stop date determination facilitates full referral process plus Phase I and Phase II under EC/NCA scenarios if commercially acceptable (e.g. consider Phase I walk away right or Art. 9 referral walk away right);
- Negotiation position will depend on whether acting for buyer or seller.

National investigations on other grounds...

- Parallel investigations by Member States if “legitimate interests” are affected – public security, plurality of the media and prudential rules (Article 21(3))
- Commission has successfully challenged a number of attempts by Member States to keep certain assets under national control (Polish banking, Italian motorway concessions, Spanish electricity)
- ECJ confirmed that Member States cannot create unwarranted obstacles to mergers reportable under the EU Merger Regulation (Case C-196/07, Spain v Commission (2008))
- NewsCorp bid for BSkyB – phase 1 EU clearance; UK Article 21(3) investigation into media plurality with separate undertakings – deal subsequently abandoned

3

Proposed reforms

Reform of the EUMR – the good...

- Proposals generally welcome:
 - Reduce burden on parties
 - Increase efficiency
 - Facilitate better case allocation between authorities
- Clear benefits to companies where would face notification in numerous Member States (e.g. 5+)
- Currently administrative burden on companies is significant if requesting referral
 - Preparation of multiple filings
 - Pre/post-notification contacts with multiple agencies
 - Agencies may approach analysis from different perspectives
- Proposals that reduce burden on companies are welcome

... And the bad

- Proposed expansion of Commission jurisdiction to entire EEA for Article 22 referrals (i.e. to Commission on MS request)
 - Step too far
 - Member State should be able to “opt out”
 - Should not be expanded to Memster State where filings were not triggered
- Recent “overreaching” by Commission where cases referred up to it
 - Examining additional markets not previously under review at national level
- Going further: should Form RS be eliminated entirely?

Final observations

- Don't see forum shopping in terms of gaming the system by slicing and dicing transactions to avoid scrutiny but it is a fact that complexity and duration of EU proceedings means that multiple national notifications will often be faster/easier
- Still quite a lot of divergence in terms of degree of sophistication, reliance and transparency about recourse of economic assessments...
- Uncoordinated national reforms add further complexity – value based thresholds, opinion papers on big data...
- EU innovation theory of harm also of concern given uncertainties and ability of NCAs to replicate
- Focus should be on alignment, predictability, and simplification wherever possible...



www.bakermckenzie.com

Baker & McKenzie International is a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.